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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA
Petitioners,

v.

JAMES DALE,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

BRIEF OF LIBERTY COUNSEL AND LIBERTY ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*

LIBERTY COUNSEL

Liberty Counsel is a non-profit civil liberties education and legal defense organization.[1] Liberty Counsel's activities include educating the public regarding civil liberties and the role of law in the judicial process in preserving and implementing individual freedoms and the democratic process. As part of advancing its purpose, Liberty Counsel coordinates with local attorneys and members of the academic community to provide educational resources and opportunities to both the lay and legal communities, publication of articles and journals in law reviews, providing legal counsel where appropriate, and filing *amicus curiae* briefs on a variety of issues.

Liberty Counsel is particularly interested in protecting the First Amendment rights of freedom of speech and association. Liberty Counsel is interested in ensuring that non-profit organizations retain their right to freedom of association and freedom of expression without fear of compulsion by the government to adopt statements or beliefs to which they are opposed.

Attorney Erik W. Stanley is a staff attorney with Liberty Counsel and was also actively involved in the Boy Scouts of America as a young man, eventually earning the Eagle Scout award in 1990. As an Eagle Scout, Attorney

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[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent are attached hereto with the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Stanley has an interest in the preservation and vitality of the Boy Scouts of America, including the continuation of the Boy Scout's message of morality and values.

Liberty Counsel files this brief, in the belief that to allow the decision of the lower court to stand would be detrimental to the First Amendment Freedoms of Association and Expression. Attorney Mathew D. Staver has previously appeared before this Court and through this brief attempts to lend his assistance in the proper evaluation of the constitutional infringement and application of the constitutional analysis.

THE LIBERTY ALLIANCE

The Liberty Alliance is a non-profit education and lobbying organization founded in 1986. The Liberty Alliance's activities include educating the public and influencing public policy regarding the role of government in preserving and implementing religious freedoms and traditional family values in the United States of America.

As part of advancing its purpose, The Liberty Alliance provides educational resources to the general public, coordinates petition drives to express the opinions of citizens to lawmakers, coordinates regional educational seminars for religious and lay community leaders, and publishes articles and produces videos for distribution to the public.

The Liberty Alliance is participating with Liberty Counsel in the filing of this brief because it is particularly interested in protecting the constitutional rights of private non-profit organizations to express their beliefs and to associate freely with whomever they choose without governmental interference. Attorney Jerry L. Falwell, Jr. is General

Counsel to The Liberty Alliance.

SUMMARY OF ARGUMENT

The New Jersey Supreme Court decision in *Dale v. Boy Scouts of America*, 734 A.2d 1196 (N.J. 1999), is in conflict with the precedents of this Honorable Court. This Court's decisions in *Bd. of Directors of Rotary Int'l. v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), concluded that the anti-discrimination statutes at issue in those cases applied to prohibit the organizations involved from refusing admission to women. These two cases, however point to the fact that an organization may conduct expressive activities such that it may be understood to be speaking as a unified whole. Specifically, Justice O'Connor in *Roberts* stated that the Boy Scouts of America are different from organizations such as the Rotary Club or the Jaycees. This difference stems from the Boy Scouts of America's mission and purpose which entitles it to First Amendment Freedom of Association protection.

Further, this Court specifically held in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) that state public accommodations laws could not be applied to a parade organizer who refused access to a parade to a group whose message it did not agree with. This Court's holding rested on the characterization of a parade organizer as a composer, choosing the parade's message from among proposed individual participants. Because the organizer chose what message to include and what message to exclude, the organizer was a private speaker with First Amendment Freedom of Expression protection. In the same way, the Boy Scouts of America is an organization that speaks as a unified whole in order to promote its mission. As such, the Boy Scouts of America should be afforded First

Amendment protection to choose what message they wish to include and what messages they choose to exclude.

The New Jersey Supreme Court's decision also is implicitly in conflict with the Seventh Circuit Court of Appeals as well as the State Supreme Courts of California, Alaska, Iowa and Massachusetts over the issue of great public importance whether the Boy Scouts of America and other similarly situated organizations may constitutionally be subject to public accommodation laws. The New Jersey Supreme Court stands alone in answering that question in the affirmative. Such a decision subjects the Boy Scouts of America, a nationwide chartered organization, to differing interpretations depending on where the organization happens to conduct its activities.

This Court should grant certiorari to resolve the conflicts between the New Jersey Supreme Court and the precedents of this Honorable Court, the precedent of the Seventh Circuit Court of Appeals and the precedents of the State Supreme Courts of the states of California, Alaska, Iowa and Massachusetts.

ARGUMENT

I.

THIS COURT SHOULD GRANT CERTIORARI OF THE NEW JERSEY SUPREME COURT DECISION AS IT IS IN CONFLICT WITH THE PRECEDENTS OF THIS COURT.

The New Jersey Supreme Court decision in *Dale v.*

Boy Scouts of America, 734 A.2d 1196 (N.J. 1999) is in conflict with the precedents of this Honorable Court. The three main cases decided by this Honorable Court addressing whether a nonprofit organization may be considered a place of public accommodation are *Bd.of Directors of Rotary Int'l. v. Rotary Club of Duarte*, 481 U.S. 537 (1987), *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).[2]

In *Rotary International*, this Court concluded that Rotary International and the Duarte Rotary Club was a "business establishment" within the meaning of the California Unruh Civil Rights Act and therefore required the clubs to admit women over the objections of Rotary International. In so applying the California statute, this Court rejected Rotary International's First Amendment defense. *Rotary Int'l.*, 481

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[2] In *Tillman v. Wheaton-Haven Recreation Ass'n.*, 410 U.S. 431 (1973), this Court held that a nonprofit recreational association that was open to all caucasian residents in a certain geographic area was not a private club exempt from federal public accommodation law because the association had "no plan or purpose of exclusiveness." *Id.* at 438. In *Daniel v. Paul*, 395 U.S. 298 (1969), this Court found that a recreational facility known as Lake Nixon was not a private club but was instead a business operated for profit with none of the attributes of self-government and membership-ownership traditionally associated with private clubs. This Court found that Lake Nixon was therefore not exempt from the Civil Rights Act of 1964. Finally, in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), this Court found that a community park could not properly be considered a private social club exempt from the Federal Civil Rights Act of 1964 because "it is open to every white person within the geographic area, there being no selective element other than race." *Id.* at 236. These cases do not directly address the issue presently before this Court.

U.S. at 549.

This Court's decision in *Rotary International* paralleled its prior decision in *Roberts*. Three years before *Rotary International*, this Court construed the Minnesota Human Rights Act to apply to the United States Jaycees. The Act in pertinent part states as follows:

> It is an unfair discriminatory practice:
>
> to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex. Minn. Stat. § 363.03, subd. 3 (1982).

Roberts, 468 U.S. at 614-615.

The United States Jaycees had raised the First Amendment as a defense to the application of the Minnesota Human Rights Act. This Court found that personal affiliations that exemplify First Amendment freedom of association protection include the creation and sustenance of a family such as marriage, the raising and education of children, and cohabitation with one's relatives. *Id.* at 619. This Court then stated that "an association lacking these qualities -- such as a large business enterprise -- seems remote from the concerns giving rise to this constitutional protection." *Id.* at 620.

Factors relevant in determining whether the First Amendment freedom of association is violated include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.

The United States Jaycees was opposed to admitting women as full voting members, but this Court found that local chapters were "large and basically unselective groups." *Id.* at 621. The *Roberts* Court also found that "numerous non-members of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another, including many of the organization's various community programs, award ceremonies, and recruitment meetings." *Id.* This Court therefore concluded that the Minnesota Human Rights Act applied to the United States Jaycees and the First Amendment right to associate was no defense. *Id.* at 622-632.

However, Justice O'Connor wrote a concurring opinion that is directly on point to the Boy Scouts in this case. In her concurrence, Justice O'Connor observed the following:

> In my view, an association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not predominately of the type protected by the First Amendment. It is only when the association is predominately engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard. An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas.

Id. at 635-636 (O'Connor, J., concurring).

Justice O'Connor's concurrence continued when she observed the following: **"Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."** *Id.* at 636 (emphasis added). Justice O'Connor then appended a footnote to the foregoing quote in which she stated the following:

> *See, e.g., Girl Scouts of the U.S.A., You Make the Difference* (1980); W. Hillcourt, The Official Boy Scout Handbook (1979); P. Fussell, The Boy Scout Handbook And Other Observations 7-8 (1982)("*The Official Boy Scout Handbook*, for all of its focus on Axmanship, Backpacking, Cooking, First Aid, Flowers, Hiking, Map and Compass, Semaphore, Trees, and Weather, is another book about goodness. No home, and certainly no government office, should be without a copy").

Roberts, 468 U.S. at 636 (O'Connor, J., concurring).

When Justice O'Connor referred to activities intended to develop "good morals, reverence, patriotism, and a desire for self-improvement", she was referring to Girl Scouts of the U.S.A. and Boy Scouts of America. There can be no doubt that she was referring to the Boy Scouts as she cites the Boy Scout's Handbook in her footnote. Thus, Justice O'Connor clearly saw a difference between the Boy Scouts organization and the United States Jaycees. In Justice O'Connor's view, public accommodation laws cannot be constitutionally applied

to the Boy Scouts of America. Unlike the United States Jaycees or the Rotary International, the Boy Scouts have a clear First Amendment freedom of association defense to such application of any public accommodation laws.

The BSA has not entered into the realm of commerce in any substantial degree. To the contrary, the Boy Scouts do teach "outdoor survival skills or participation in community service" which indeed are "expressive" activities "intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Id.* at 636.

This Court's protection of the expressive activities of organizations under the First Amendment continued in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In a unanimous decision, this Court held that a parade organizer could exclude a group from a parade simply because he disagreed with the message the group wished to convey. *Id.* at 581. This Court held that the public accommodations law of Massachusetts could not be applied to compel the parade organizer to include the Gay, Lesbian and Bisexual group in its parade. *Id.* *Hurley* is directly on point with the case at bar and should have controlled the outcome below.

The Massachusetts public accommodations law in pertinent part, states that it is prohibited to discriminate on the basis of:

> race, color, religious creed, national origin, sex, sexual orientation..., deafness, blindness or any physical or mental disability or ancestry in the admission of any person to, or treatment [in] any place of public accommodation, resort or amusement. Mass. Gen. Laws § 272:98

(1992)

Id. at 572.

The parade organizer raised the First Amendment as a defense to the application of the Public Accommodations Law. This Court found that a parade is an expressive activity and that the parade organizer is "[r]ather like a composer... select[ing] the expressive units from potential participants..." *Id.* at 574. The parade organizer had decided to exclude the Gay, Lesbian and Bisexual group from participation in the parade. This Court stated, with respect to that judgment:

> ...the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another... it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.

Id. at 574-575.

This Court stated that a parade's message is "distilled from the individual presentations along the way, and each unit's expression is perceived by the spectators as part of the whole." *Id.* at 577. In this respect, a parade "does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience." *Id.* at 576.

In the same way, the BSA is an expressive organization

with a coherent message pieced together by the organization's leadership. The message of the BSA is the promotion of virtues and ethical choices in young people. *See* BSA Mission Statement. This message is transmitted through the Scout Oath as well as the Scout Law which each scouting member is required to memorize and be prepared to recite. As Justice O'Connor stated in *Roberts*, "Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring).

The BSA is an organization promoting values and goals in young people. This message is borne out every day in the thousands of scouting meetings across the country by those in positions of authority in the individual scout troops. Like the parade organizer in *Hurley*, the BSA organizers select those individuals that will promote the message they wish to instill in young people. The use of the New Jersey Public Accommodations Law to compel the BSA to include a message they disapprove of is precisely the type of infringement on the Freedom of Expression this Court struck down as unconstitutional in *Hurley*. As this Court stated in *Hurley*, "Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others." *Hurley*, 515 U.S. at 581.

Clearly the decision of the New Jersey Supreme Court in *Dale* is in direct conflict with the underlying precedents of this Court. This Court should therefore grant certiorari to resolve the conflict.

II.

THIS COURT SHOULD GRANT CERTIORARI TO ANSWER THE QUESTION OF GREAT PUBLIC IMPORTANCE WHETHER THE BOY SCOUTS OF AMERICA ARE GOVERNED BY PUBLIC ACCOMMODATION LAWS.

This Court should grant certiorari to review the New Jersey Supreme Court decision in *Dale v. Boy Scouts of America*, 734 A.2d 1196 (N.J. 1999) in order to answer the question of great public importance and to resolve the conflict that has arisen among both the state and federal courts as to whether the Boy Scouts of America or other similarly situated nonprofit associations may constitutionally be subjected to public accommodation laws. A conflict has arisen among both the state and federal courts which needs to be resolved by this Court. This issue is of great public importance as the decision in *Dale* affects not only the Boy Scouts but other similar nonprofit organizations.

A.

This Court Should Grant Certiorari To Resolve The Conflict Between The New Jersey Supreme Court Decision And The Seventh Circuit Court Of Appeals.

The New Jersey Supreme Court decision is in direct conflict with the Seventh Circuit Court of Appeals in answering the question of whether the Boy Scouts of America are governed by public accommodations laws. This is an issue of great public importance that needs to be decided by this Court. In *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir.), *cert denied*, 510 U.S. 1012 (1993), the

Seventh Circuit Court of Appeals held that the Boy Scouts is not a "place of public accommodation" under Title II of the Civil Rights Act of 1964 because "Congress when enacting § 2000a(b) never intended to include membership organizations that do not maintain a close connection to a structural facility within the meaning of 'place of public accommodation.'" *Id.* at 1269.

The New Jersey Supreme Court decision in *Dale* is in conflict with the Seventh Circuit Court of Appeals in *Welsh* over the issue of great public importance, namely, whether the Boy Scouts of America and other groups similarly situated are governed by Public Accommodations Laws.

The BSA is a national organization that is federally chartered. Because of the scope of the organization, the BSA is subject to differing interpretations depending on where in the country they are operating. These differing interpretations of whether the Public Accommodations Laws, such as Title II, apply to the BSA make it difficult for the BSA to operate as a unified and coherent organization. The conflict also makes it difficult for other similarly situated non-profit organizations to operate effectively. In this respect, the issue whether public accommodation laws apply to organizations such as the BSA is one of the utmost public importance. As the seventh Circuit stated in *Welsh*:

> When the government, in this instance through the courts, seeks to regulate the membership of an organization like the Boy Scouts in a way that scuttles its founding principles, we run the risk of undermining one of the seedbeds of virtue that cultivate the sorts of citizens our nation so desperately needs.

Welsh, 993 F.2d at 1278.

This Court should grant certiorari to resolve the conflict between the New Jersey Supreme Court and the Seventh Circuit Court of Appeals.

B.

This Court Should Grant Certiorari To Resolve The Conflict Among The State Courts.

In *Dale*, the New Jersey Supreme Court addressed the question as to whether the Boy Scouts were subject to the New Jersey Law Against Discrimination. The state law in pertinent part states as follows:

> All persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, . . . without discrimination because of . . . affectional or sexual orientation.

Dale, 734 A.2d at 1207.

The New Jersey Supreme Court in *Dale* concluded that the Boy Scouts were governed by the New Jersey Law Against Discrimination and rejected the Boy Scouts' First Amendment defense. The Court based its ruling in part upon a finding that the Boy Scouts engaged in broad public solicitation. This case conflicts with other state Supreme Court rulings.

While there is not a direct conflict between the New Jersey Supreme Court case and other various state Supreme

Court cases with respect to a federal question, the First Amendment right to freedom of association was raised as a defense in each of the cases. The courts in each of the cases, however, did not decide the case on the basis of the First Amendment, deciding the cases instead on the construction of the various state public accommodations laws at issue. However, the First Amendment right to freedom of association was always at issue in each of the state Supreme Court cases, even if those cases did not address the First Amendment squarely. In this respect, the New Jersey Supreme Court case is in conflict with other state Supreme Court cases because the New Jersey decision necessitated that the court confront the First Amendment issue directly, whereas the other state Supreme Court decisions did not mandate such an analysis. Had the other state Supreme Courts decided the public accommodations law issue differently, they would have then been required to confront the First Amendment defense squarely.

In *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218 (Cal. 1998), the California Supreme Court addressed the question as to whether the Boy Scouts should be considered a public accommodation under the state law known as the Unruh Civil Rights Act. In *Curran*, a former Eagle Scout made application to become an assistant Scoutmaster. The application was rejected by the BSA after learning that the applicant publicly stated he was homosexual and publicly expressed his commitment to communicating to others his view as to the acceptability and morality of homosexuality. *Id.* at 219. The statute under consideration in *Curran* stated in pertinent part as follows:

> All citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and

> privileges of inns, restaurants, hotels, eating houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens.

Id. at 229.

Even though the California Supreme Court noted that the Boy Scouts did engage in certain commercial transactions, the Court nevertheless concluded the following:

> [W]e do not believe that the circumstance that the Boy Scouts is generally nonselective in its admission policies, and affords membership to a large segment of the public, is itself sufficient to demonstrate that the organization reasonably can be characterized as the functional equivalent of a traditional place of public accommodation or amusement. The record establishes that the Boy Scouts is an organization whose primary function is the inculcation of a specific set of values in its youth members, and whose recreational facilities and activities are complementary to the organization's primary purpose.

Id. at 236.

The California Supreme Court noted that "the Boy Scouts is an expressive social organization whose primary

function is the inculcation of values in its youth members, and whose small social group structure and activities are not comparable to those of a traditional place of public accommodation or amusement." *Id.* at 238. The Court then concluded that the Boy Scouts "is not a business establishment whose membership policies or decisions fall within the reach of the Act." *Id.* Since the Court in *Curran* found that the BSA did not constitute a business establishment within the public accommodation statute, it did not reach the First Amendment defense. The court, however, was clearly influenced by the First Amendment. *Id.* at 255-56 (Kenard, J., concurring). The New Jersey Supreme Court ruling in *Dale* is in direct conflict with the California Supreme Court ruling in *Curran*.

In *United States Jaycees v. Richardet*, 666 P.2d 1008, 1011 (Alaska 1983), the Alaska Supreme Court found that "the word 'place' . . . . would not encompass a service organization lacking a fixed geographical situs." Thus, since the Boy Scouts meet in various locations, under the Alaska Supreme Court decision, the Boy Scouts would not be considered a place of public accommodation. The Jaycees had raised the First Amendment as a defense, claiming that application of the public accommodation law to them would violate the organization's freedom of association, among other constitutional violations. *Id.* at 1010. The Alaska Supreme Court did not consider this defense, instead deciding the case on the basis of the construction of the Public Accommodation Law. The Alaska Supreme Court decision is therefore in direct conflict with the New Jersey Supreme Court decision.

Similarly, in *United States Jaycees v. Iowa Civil Rights Comm'n.*, 427 N.W.2d 450, 454 (Iowa 1988), the Iowa Supreme Court stated that the "United States Jaycees is not a 'place' within our definition of 'public accommodation'". The

Jaycees had originally raised the First Amendment right to freedom of association as a defense but amended their bylaws once this Court issued its decision in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Furthermore, in *United States Jaycees v. Massachusetts Comm'n Against Discrimination*, 463 N.E.2d 1151, 1156 (Mass. 1984), the Massachusetts Supreme Court found that the antidiscrimination law "does not apply to [a] membership organization, since such an organization does not fall within the commonly accepted definition of 'place.'" Similarly, the Jaycees raised the First Amendment right to freedom of association as a defense to the application of the Public Accommodations Law of Massachusetts. *Id.* at 1153. The court, however, did not address the First Amendment defense, preferring to decide the case on the basis of the construction of the Public Accommodations Law. The New Jersey Supreme Court ruling in *Dale* is therefore in conflict with the Iowa and Massachusetts Supreme Courts.

In addition to the foregoing, the New Jersey Supreme Court case also conflicts with the state supreme court decisions in Connecticut, Kansas, and Oregon. *See Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities*, 528 A.2d 352 (Conn. 1987); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 891 P.2d 385 (Kan. 1995); and *Schwenck v. Boy Scouts of America*, 551 P.2d 465 (Or. 1976).

This Court should grant certiorari to resolve the conflict among the state Supreme Courts.

CONCLUSION

This Court should grant certiorari to review the decision of the New Jersey Supreme Court as it is in conflict with the precedents of this Court. The New Jersey Supreme Court's decision is also in conflict with the Seventh Circuit Court of Appeals and is in conflict with the Supreme Courts of California, Alaska, Iowa, and Massachusetts. Further, the issue of whether the Boy Scouts of America is governed by the Public Accommodations Laws is a question of great public importance that should be decided by this Court. This Court should grant certiorari.

Respectfully submitted,

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